

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID R. RASMUSSEN, Complainant,

vs.

**WESTON TEACHERS' ASSOCIATION,
SOUTH CENTRAL UNITED EDUCATORS, and
WISCONSIN EDUCATION ASSOCIATION**, Respondents.

Case 31
No. 54868
MP-3267

Decision No. 29341-C

**ORDER DENYING MOTION TO
DISMISS AMENDED COMPLAINT**

David R. Rasmussen filed a complaint with the Wisconsin Employment Relations Commission on February 11, 1997, *pro se*, which alleged that the Weston Teachers' Association, South Central United Educators and the Wisconsin Education Association had committed prohibited practices by failing to arbitrate his non-renewal as a teacher from the Weston School District, or to pay for arbitration on his behalf. Thereafter, the complaint was held in abeyance until Rasmussen notified the Commission that he desired to proceed to hearing. On March 31, 1998, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. On May 19, 1998, the Complainant, now represented by counsel, filed an amended complaint. On June 10, 1998, the Respondents filed a Motion to Dismiss Amended Complaint. Hearing on the complaint is set for June 16, 1998. The Examiner, being fully advised in the premises, makes and issues the following

ORDER

The Motion to Dismiss the Amended Complaint is denied.

Dated at Madison, Wisconsin, this 12th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

WESTON SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION
TO DISMISS AMENDED COMPLAINT**

The Respondents' motion to dismiss is governed by Chapters 111 and 227. The original complaint alleged the Respondents violated Secs. 111.70(2) and (3)(b), 1, 2 and 3, Stats. Through the operation of Sec. 111.70(4)(a), Stats., Sec. 111.07, Stats., governs the procedures by which those allegations must be heard. Chapter 227 states the framework common to administrative agency proceedings.

Sec. 227.01(3), Stats., defines a "Contested case" to mean "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order."

The Commission is an "Agency" under Sec. 227.01(1), Stats., thus making this proceeding an "agency proceeding." To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined after a hearing required by law. The remedy sought by the Complainant is "fees and costs for attorneys." His interest in same is deemed "substantial," and is, as the Respondents' answer to the amended complaint demonstrates, "controverted by another party." Given the foregoing, this is a contested case.

Chapter 227 does not provide a summary judgement procedure. The right to hearing is explicit, and the dismissal of a case prior to evidentiary hearing is not. Pre-hearing dismissal of a contested case is, then, an uncommon result.

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases. . . (It would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. 1/

1/ 68 OAG 31, 34 (1979). *The opinion letter was requested by the Wisconsin Real Estate Examining Board and concerned the "denial, limitation, suspension or revocation of licenses."*

The Commission has reflected this reluctance to denying hearing in its own case law:

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 2/

2/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3.

The Complainant points to Sec. 111.70(3)(b), Stats., as the basis of a duty breached by the Respondents. The Commission does enforce the duty of fair representation owed by a labor organization to members of a bargaining unit it represents. This duty was “judicially developed as a necessary corollary to the status of exclusive representative. . .” 3/ The duty of fair representation is, at root, an equitable doctrine.

3/ The Developing Labor Law, Hardin (BNA, 1992) at 1409.

The allegations contained in the amended complaint do not make out a clear action against the Respondents under Sec. 111.70(3)(b), Stats. Be that as it may, the ambiguity surrounding the duty of fair representation makes the risk of denying hearing greater than the risk of granting it.

In this case, it cannot be said that the sole interpretation to be drawn from the original and amended complaint is that the Respondents are entitled to judgment in their favor. That being so, it is held that resolution of the complaint’s merits can be determined only after an evidentiary hearing on the complaint. Accordingly, the Examiner has denied the Motion to Dismiss.

Dated at Madison, Wisconsin, this 12th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner